RFW AF 1761

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

CERTIFICATE OF MAILING

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"Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450"

on October 12, 2004

Edward A. Squillante, Jr.
Reg. No. 38,319
Attorney for Applicant(s)

October 12, 2004
Date of Signature

Appellant: Liedl et al.
Serial No.: 10/057,089
Filed: January 25, 2002
For: NUT BUTTER AND RELATED PRODUCTS AND METHOD OF MAKING SAME

Group: 1761
Examiner: H. Pratt
October 12, 2004

BRIEF FOR APPELLANTS

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Enclosed herewith are three (3) copies of an Appeal Brief for Appellant.

Please charge the $340.00 fee to our Deposit Account No. 12-1155. Any deficiency or overpayment should be charged or credited to this Deposit Account. This authorization is submitted in triplicate.

Respectfully submitted,

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PATENT

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Edgewater, New Jersey 07020
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BRIEF FOR APPELLANTS

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I. REAL PARTY IN INTEREST

The Real Party in Interest in this Appeal is Unilever Bestfoods, North America, a corporation of the State of New York.

II. RELATED APPEALS AND INTERFERENCES

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

III. STATUS OF CLAIMS

This Appeal is taken from the Final Rejection of claims 1 through 12, the pending claims in the application. A copy of the appealed claims is attached to this Brief as an Appendix.

IV. STATUS OF AMENDMENTS

No Amendment was made in the 37 CFR §1.116 Reply to the Final Rejection filed on August 11, 2004.

V. SUMMARY OF THE INVENTION

The invention set forth in the claims on appeal is directed to a nut butter or nut spread composition. Particularly, the invention relates to a composition that is a peanut butter like product with a creamy characteristic. The claimed composition has a high percentage of medium sized particles and a spreadability of about 4.000 kg to about 5.300 kg.

By the presently claimed invention, therefore, a superior nut butter or nut spread composition has been prepared. As may be readily gleaned from, for example, Examples 1-8 in the specification, the claimed composition unexpectedly displays superior spreadability when compared to conventional like compositions.

In the Specification, the portion from page 1, line 4 to page 5, line 9 is background. The phraseology used in claim 1 may be found, for example, on

page 11 of the specification as originally filed. Beginning at page 14, line 19, working examples, illustrating the unexpected and superior properties of the composition of this invention, are put forth.

VI. ISSUES AS FRAMED BY THE FINAL REJECTION

The issue raised in this appeal is primarily one of fact and of the type normally encountered in connection with a rejection made under 35 USC § 103. In particular, the issue is as follows:

Would one of ordinary skill in the art, upon reading Wong et al. (U.S. Patent No. 5,079,027) and Wong et al. (U.S. Patent No. 5,693,357) and Wong et al. (U.S. Patent No. 5,885,645) and Fix et al. (U.S. Patent No. 5,714,193) and Meade (U.S. Patent No. 6,010,737) find it obvious to make a nut butter or nut spread composition having the particle size distribution and spreadability as claimed in the present invention?

VII. GROUPING OF CLAIMS

Appellants submit that claims 1 through 12 stand and fall together.

VIII. APPELLANTS' ARGUMENTS

I. Rejection Under 35 USC §103

The Examiner has maintained the rejection of claims 1-12 under 35 USC §103 as being unpatentable over Wong et al., U.S. Patent No. 5,693,357, in view of Wong et al., U.S. Patent No. 5,079,027, Wong et al., U.S. Patent No. 5,885,645, Fix et al., U.S. Patent No. 5,714,193 and Meade, U.S. Patent No. 6,010,737 (hereinafter, '357, '027, '645, '193, and '737, respectively). As already made of record, the Examiner maintains, in summary, that Wong ('357) discloses a nut butter containing nut ingredients, seasonings, stabilizer, emulsifier and bulking agents with a particle size distribution of which 90% of the particles are less than 40 microns, and 50% of the particles are smaller than 10 microns. The Examiner admits that claim 1 of the present invention is distinguishable from the '357 reference in that the present invention requires 50% of its particles to be smaller than 3 microns and 1.4% of the particles to be larger than 58.7 microns to produce a particular spreadability.

In an attempt to cure the vast deficiencies of the primary reference (namely the '357 reference) the Examiner relies on the '027 reference which discloses a composition having 80% of the particles between 2-11 microns. The Examiner further relies on the '645 reference which discloses a process for milling nuts to various micron sizes and the '193 reference which discloses a process for milling nuts to a mean size of 10.5 microns. The Examiner also relies on the '737 reference for disclosing a process for milling nuts to various particle sizes. The Examiner believes that nothing new is seen in

a composition with small amounts of particles being larger than 58.7 microns as in crunchy peanut butter. Moreover, the Examiner concludes that the viscosities of claim 2 are obvious, that it would be obvious to vary particle sizes to achieve a particular nut size, and that the '357 reference discloses reduced fat peanut spreads. Based on the above, the Examiner maintains that claims 1-12 are obvious in view in the multitude of references relied on herein.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention is directed to a superior nut butter made via a gap mill process to produce a product which is very spreadable and that takes less force to spread with a knife. Independent claim 1 describes a nut butter or nut spread composition comprising (a) a nut ingredient, (b) from about 0-10% seasonings, (c) from about 0.5 to 2.5% stabilizer, (d) from about 0-1% emulsifier, and (e) from about 0-60% bulking agent whereby the particle size distribution of the nut butter or nut spread composition has a lower percentage of fine and coarse size particles and a higher percentage of medium size particles such that at least 90% of the particles are smaller than about 40 microns, at least 50% of the particles are smaller than about 3 microns and 1.4% of the particles are larger than 58.7 microns wherein the composition has a spreadability of about 4.000 kilograms to about 5.300 kilograms.

The invention is further defined by the dependent claims which claim, among other things, specific viscosities, the type of nut ingredient, the addition of oil, and a spreadability from about 4.915 kilograms to about 5.215 kilograms.

Independent claim 7 is directed to a reduced fat nut spread comprising (a) a nut ingredient, (b) from about 0-10% seasonings, (c) from about 0.3 to 2.5% stabilizer, (d) from about 0-1% emulsifier, and (e) from about 0-60% bulking agent wherein the particle size distribution of the nut spread composition has a lower percentage of fine and coarse size particles and a higher percentage of medium size particles such that at least 90% of the particles are smaller than about 40 microns, at least 50% of the particles are smaller than about 10 microns, at least 10% are smaller than about 3 microns and 1.4% of the particles are larger than 58.7 microns, the composition having a spreadability of about 4.000 kilograms to about 5.300 kilograms.

The composition of claim 7 is further defined by the dependent claims which claim, among other things, specific viscosities, the type of nut ingredient, the addition of oil and a spreadability from about 4.915 kilograms to about 5.215 kilograms.

In contrast, and as already made of record, the '357 reference merely discloses a nut paste having a particular monomodal particle size distribution. The monomodal nut butters and spreads of the '357 reference typically comprise from about 50% to 100% of a nut paste with water insoluble solids comprising a particle size of less than about 21.6 microns.

The '357 reference does not, even remotely, teach, suggest or describe any of the important and critical limitations set forth in independent claims 1 and 7. In an attempt to cure the vast deficiencies of the '357 reference, the Examiner relies on the '027 reference, the '645 reference, the '193 reference, and the '737 reference, all of which disclose a variety of pastes having particle size distributions that do not, even remotely, suggest or render obvious the size distribution set forth in the present independent

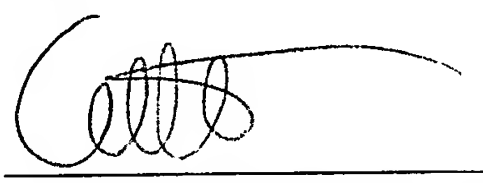
claims. Moreover, there is no teaching whatsoever that suggests the specific spreadability (as clearly defined in the specification) of the nut butter compositions set forth in the present claims. Appellants respectfully submit that it is improper for the Examiner to rely on a multitude of references and suggest that peanuts can be ground to a particular size in order to produce a particular spreadability. It is also improper for the Examiner to conclude that specific viscosities would be obvious. Appellants have demonstrated in the examples that the peanut butter composition of the present invention has a spreadability that is superior to that of conventional brands. Since the Examiner has not found a combination of references that even remotely suggests the limitations of the presently claimed invention, Appellants herein submit that the final rejection made under 35 USC §103 is improper and should be withdrawn and rendered moot.

It is, again, respectfully submitted that all claims of record are now in condition for allowance. Reconsideration and favorable action are earnestly solicited.

IX. CONCLUSION

Appellants respectfully request that the Board of Patent Appeals and Interferences reverse the Examiner's final rejection of claims 1-12 under 35 U.S.C. §103.

Respectfully submitted,



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X. APPENDIX

1. A nut butter or nut spread composition comprising (i) a nut ingredient, (ii) from about 0-10% seasonings, (iii) from about 0.5-2.5% stabilizer, (iv) from about 0-1% emulsifier and (v) from about 0-60% bulking agent, and the particle size distribution of said nut butter or nut spread composition having a lower percentage of fine and coarse sized particles and a higher percentage of medium sized particles such that at least 90% of the particles are smaller than about 40 microns, at least 50% of the particles are smaller than about 10 microns and 1.4% of the particles are larger than 58.7 microns wherein the composition has a spreadability of about 4.000 kg to about 5.300 kg.

2. The composition of claim 1 having a Brookfield viscosity from about 6,000 to about 14,000 centipoise taken at a temperature of 85° C after 60 seconds at 20 rpm with a spindle D, heliopath.

3. The composition of claim 1 wherein the nut ingredient is nuts, nut slurry or defatted nut flour or a combination thereof or nuts and nut slurry, nuts and defatted nut flour or nut slurry and defatted nut flour.

4. The composition of claim 3 further comprising nut oil.

5. The composition of claim 1 wherein the nut ingredient is a peanut ingredient.

6. The composition of Claim 1 having a spreadability of from about 4.915 kg to about 5.215 kg.

7. A reduced fat nut spread composition comprising (i) a nut ingredient, (ii) from about 0-10% seasonings, (iii) from about 0.3-2% stabilizer, (iv) from about 0-1% emulsifier and (v) from about 10-60% bulking agent and the particle size distribution of said nut spread composition having a lower percentage of fine and coarse sized particles and a higher percentage of medium sized particles such that at least 90% of the particles are smaller than about 40 microns, at least 50% of the particles are smaller than about 10 microns, at least 10% of the particles are smaller than about 3 microns and 1.4% of the particles are larger than 58.7 microns wherein the composition has a spreadability of about 4.000 kg to about 5.300 kg.

8. The composition of claim 7 having a Brookfield viscosity from about 6,000 to about 14,000 centipoise taken at a temperature of 85°C after 60 seconds at 20 rpm with a spindle D, heliopath.

9. The composition of claim 7 wherein the nut ingredient is nuts, nut slurry or defatted nut flour or a combination thereof or nuts and nut slurry, nuts and defatted nut flour or nut slurry and defatted nut flour.

10. The composition of claim 9 further comprising nut oil.

11. The composition of claim 7 wherein the nut ingredient is a peanut ingredient.

12. The composition of claim 7 having a spreadability of from about 4.915 kg to about 5.215 kg.